Supreme Court, U.S.
FILED
DEC 28 1992
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(2)

No. 92-909

In The

Supreme Court of the United States

October Term, 1992

DONALD LEE TIPTON and LINDA TIPTON,

Petitioners,

v.

BERGROHR GMBH-SIEGEN and
BERGROHR GMBH-HERNE,

Respondents.

**On Petition For Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals**

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners, Donald Lee Tipton and Linda Tipton, (collectively "Tipton"), mischaracterize the motion for summary judgment filed by Respondents, Bergrohr GMBH-Siegen and Bergrohr GMBH-Herne, ("Siegen" and "Herne"), and would have this Court believe that Respondents' motion for summary judgment was only a "partial" motion for summary judgment on certain theories of legal liability. To the contrary, Siegen and Herne's motion for summary judgment was directed toward all of Tipton's claims for negligence and strict products liability. (Pet.App. 24a-51a). If the Tiptons had any doubt that the motion for summary judgment applied to all claims, they needed look no further than the district court's order and notice of Defendants' motion for summary judgment, filed in the U.S. District Court, on or about October 6, 1989 (Appendix A).

While it is true the district court did ultimately base its decision granting summary judgment on the Florida cases of *Lane v. International Paper Company,* 545 So.2d 484 (Fla. 1st DCA 1989); and *Johnson v. Supro Corporation,* 498 So.2d 528 (Fla. 3rd DCA 1986), the district court also acknowledged and applied this court's legal analysis in *Celotex Corporation v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986). To-wit, the district court noted:

> "The party who bears the burden of proof on a certain issue at trial also bears the burden of establishing that there are disputed facts with respect to that issue on a motion for summary judgment. *Celotex Corporation v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 Ed.2d 265 (1986). If a

> party fails to make a showing sufficient to establish the existence of an element essential to his case, then summary judgment should be entered against him. In this situation, there can be no 'genuine issue of material fact', because a complete absence of proof of an essential element of that party's case renders all other facts immaterial." *Id* at 322-23. (Pet.App. 18a-19a).

The Tiptons were clearly put on notice in Siegen and Herne's motion for summary judgment that the motion for summary judgment applied to Plaintiffs' claim for negligence. Siegen and Herne's motion for summary judgment stated:

> "More recently, we find the case of *Lane v. International Paper Company,* 14 FLW 1520 (1st DCA Opinion, June 22, 1989).
>
> Since this opinion is yet to be reported in the advance sheets, a copy is attached for the Court's information. Of course, Plaintiff's counsel is intimately familiar with this case since both Plaintiff's counsel were co-counsel in Plaintiff in the *Lane* case.
>
> As stated by First District Court of Appeal:
>
> . . . . **On any theory of products liability,** whether it be for negligent design or manufacture of the product, for breach of implied warranty, or strict liability, in order for the manufacturer to be liable, the injured party must show that the manufacturer is the business of and gains profits from the distribution and sale of the product through the stream of commerce." [Emphasis Supplied] (Pet.App. 30a-31a).

Tipton now claims that Siegen and Herne's motion for summary judgment was limited to the "narrow

ground that Siegen and Herne were not in the business of making or selling size-machines" (Pet.Br. 4), however, the language of Siegen and Herne's motion (Pet.App. D) and the notice given by the trial court (Pet.App. A), show that this was not the case.

ARGUMENT AGAINST ALLOWANCE OF WRIT OF CERTIORARI

Petitioners' argument that the Eleventh Circuit Court of Appeals decision below conflicts with this Court's decisions in *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), is not well taken. The Eleventh Circuit decision below applies the doctrines espoused in *Celotex* and *Adickes* in accordance with the law, and specifically in accordance with Rule 56(e) of the Federal Rules of Civil Procedure.

Tipton's argument that Siegen and Herne failed to meet their "initial burden" *as a matter of law* does not comply with reason or common sense given the record submitted in this case. Whether Count II of Tipton's Complaint is interpreted as a "general negligence" claim (Pet.App. 7a-8a), or as a "products liability negligent design" claim (Pet.App. 8a-Footnote 11), there can be no question but that Siegen and Herne's motion for summary judgment was specifically addressed to Counts I and II of Plaintiffs' Amended Complaint (Pet.App. 5). With this in mind, Tipton could not sit idly by relying on a strained interpretation of the pleadings to defeat the

motion for summary judgment. This is precisely what *Celotex* and Rule 56(e) say a non-movant should *not* do when faced with a summary judgment motion, and the law on this issue is clear and unequivocal.

The instant case is similar to *Celotex* in that discovery had been conducted for nearly two years, and no serious argument can be made by Tipton that he was "railroaded" by a premature motion for summary judgment, or one which would not be final as to all claims. *Celotex Corporation v. Catrett*, 106 S.Ct. 2548, 2554, 477 U.S. 325. If Tipton perceived such a problem with Siegen and Herne's motion for summary judgment, he could have properly moved under Rule 56(f) which provides:

> "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

In any event, Tipton's argument that his burden as the non-movant on the motion for summary judgment was unclear is ludicrous given this Court's statements of the law in *Celotex*, and the Advisory Committee Notes on the 1963 Amendment to Subdivision (e) of Rule 56 of the Federal Rules of Civil Procedure.

In *Celotex v. Catrett*, this Court noted:

> "Rule 56(e) therefore requires the non-moving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers

> to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial'. . . . **Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves,** and it is from this list that one would normally expect the non-moving party to make the showing to which we have referred." 106 S.Ct. 2548, 2553, 477 U.S. 325. (Emphasis Supplied)

The Advisory Committee Note on the 1963 Amendment to Rule 56(e) details a scenario not unlike the record in the instant case. The committee Note states in pertinent part:

> ". . . . A typical case is as follows: a party supports his motion for summary judgment by affidavits or other evidentiary matters sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation, Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are 'well pleaded', and not supposititious, conclusory, or ultimate. *Citations omitted.*
>
> The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. **The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule."** *Citations*

> *omitted.* Advisory Committee Note on the 1963 Amendment to Rule 56(e), Federal Rules of Civil Procedure. [Emphasis Supplied]

In summary, the dilemma in which Tipton now find himself is of his own making. If Tipton had *any doubt* as to the finality of Siegen and Herne's motion for summary judgment, he should not have relied upon his ambiguously worded Complaint. Alternatively, he should have availed himself of the procedures available under Rule 56(f) to postpone Siegen and Herne's motion for summary judgment. The opinion of the Eleventh Circuit Court of Appeal is well-reasoned and constitutes a proper application of the law given the record in this case.

CONCLUSION

This Court and the Federal Rules of Civil Procedure have done a a more than adequate job of clarifying what the burden of non-movant is in opposing a motion for summary judgment. Petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DONALD LEE TIPTON and
LINDA TIPTON,

Plaintiffs,

v.

Case No.
87-50148-RV

BERGROHR GMBH-SIEGEN, et al.,

Defendants.

ORDER AND NOTICE

Defendants' motion for summary judgment (doc. 60) will be taken under advisement by the Court on October 16, 1989. Because the Court does not contemplate scheduling a hearing on the motion, the parties are directed to file and serve affidavits and any other documents or materials authorized to be filed under the Federal Rules of Civil Procedure prior to the above date. Only those pleadings and evidentiary materials currently in the record or filed prior to the above date will be considered by the Court in ruling on this motion. The motion for summary judgment will result in a final judgment being entered for the moving party, of course, if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and any other appropriate evidentiary materials properly filed in the record show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56,

Fed.R.Civ.P., *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985); *Moore v. State of Florida*, 703 F.2d 516 (11th Cir. 1983).

DONE AND ORDERED this 6th day of October, 1989.

/s/ Roger Vinson
ROGER VINSON
United States District Judge